

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
TACOMA DIVISION**

JOHN DOE #1, *et al.*,

Plaintiffs,

vs.

SAM REED, *et al.*,

Defendants.

No. 3:09-CV-05456-BHS

**Reply in Support of Plaintiffs' Motion for  
Protective Order**

NOTE ON MOTION CALENDAR: Friday,  
Sept. 17, 2010

The Honorable Benjamin H. Settle

**ORAL ARGUMENT REQUESTED**

**Introduction**

Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington move for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to protect the identities of traditional marriage supporters gleaned through the discovery process in the present proceeding. As set forth below, and in Plaintiffs' memorandum in support (Dkt. 125), a protective order is necessary to prevent annoyance, embarrassment, and oppression of such individuals.

The ultimate issue in this case is whether the disclosure of the names and addresses of Referendum 71 petition signers will expose the signatories to a reasonable probability of threats, harassment and reprisals. A protective order, protecting the identities of traditional marriage supporters, limited in duration to the discovery process, protects the parties' ability to develop

the factual record necessary to answer this question free from the influence of such threats, harassment, and reprisals. Allowing Defendants to release identifying information about supporters of traditional marriage learned during the discovery process, especially before any party has designated said information for inclusion in a dispositive motion or trial, unnecessarily exposes such individuals to threats, harassment, and reprisals. Thus, a protective order should issue.

## Argument

### **I. The Strong Presumption in Favor of Public Access to Judicial Records Does Not Attached to Pretrial Discovery Materials.**

There is a strong presumption in favor of public access to *judicial records*. *Phoenix Newspapers, Inc. v. U.S. Dist. Court for the D. of Ariz.*, 156 F.3d 940, 946 (9th Cir. 1998). Relying on this presumption, Defendants mistakenly argue that the same presumption applies to *pre-trial discovery materials* before any party has designated their contents for inclusion in the judicial record, either in the form of attachments to a dispositive motion, or for trial. (Dkts. 129, 133, and 134.)

In *Seattle Times Co. v. Rhinehart*, the Supreme Court explained that the modern liberal discovery process had no equal at common law, and that the modern discovery process is conducted in private. 467 U.S. 20, 33 (1984). The scope of discovery is liberally construed. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir. 1961). A party may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). To be relevant, the information need not be admissible, only reasonably calculated to lead to the discovery of admissible evidence. *Id.*

As a result, "much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. *Seattle Times*, 467 U.S. at 33. *See also Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1986) (explaining how a public discovery process would frustrate the goals of the liberal discovery rules). Given this fact, and in light of the threats, harassment, and reprisals directed at supporters of traditional marriage, it would be

premature to release any identifying information about witnesses until the parties have designated what, if any, information will be included in the judicial record.

Moreover, Defendants mistakenly infer a public *right* to access discovery materials from the presumption that a party *may* release information obtained through discovery absent a protective order. *See, e.g., Phillips v. General Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002). When a party objects to disclosure of discovery material by filing a motion for protective order, the district courts are given “broad latitude” to craft an appropriate order to prevent disclosure of information, both to protect the parties and the ends of justice itself. *Id.* Here, a protective order, preventing the release of identifying information about traditional marriage supporters, serves both purposes and is necessary to allow the parties an opportunity to develop their cases through an accelerated discovery process free from the improper influence of threats, harassment, and reprisals.

## **II. Plaintiffs’ Request Does Not Prejudice Defendants Because Plaintiffs Seek Only to Prevent Public Disclosure of Discovery Materials, Not Discovery Itself.**

Moreover, Plaintiffs have not sought to limit the scope of Defendants’ discovery. Plaintiffs have asked only that the identities (and other identifying information) of traditional marriage supporters learned through the discovery process remain confidential during the factual development of this case. (Dkt. 125 at 7.) Defendants remain free to depose witnesses and otherwise conduct discovery.

In light of the strong presumption of access to *judicial records*, a case-by-case determination will be made when the parties designate information obtained through discovery for inclusion in the judicial record.<sup>1</sup> Plaintiffs respectfully request an opportunity to file an appropriate motion once the parties have designated such information. But there is no prejudice in entering a protective order during the discovery process, especially in light of the substantial evidence of

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<sup>1</sup> WAFST cites *NOM v. McKee*, 2010 WL 3270092 (D. Me. Aug. 19, 2010), presumably because it involves a dispute about *trial materials* and the issue of same-sex marriage. (Dkt. 129 at 9 n.4.) WAFST correctly notes that the district court ordered the parties to “re-file the trial evidence as unsealed document, part of the public record,” *NOM v. McKee*, 2010 WL 3270092 at \*1 n.4. However, WAFST fails to mention that the First Circuit has stayed that portion of the order pending appellate review. (Dkt. 138, Decl. of Scott F. Bieniek, Ex. 1.) And again, the case involved evidence attached to dispositive motions, not to discovery materials generally.

1 threats, harassment, and reprisals directed at traditional marriage supporters in the record, and  
 2 when so little of the information gleaned through discovery is likely to be included in the judicial  
 3 record in this case. *See Seattle Times*, 467 U.S. at 33.

4 **III. Plaintiffs Have Demonstrated Good Cause for Entry of a Protective Order Preventing**  
 5 **the Release of Witness Identity Prior to Trial.**

6 The Court is certainly familiar with the record in this case. Plaintiffs have submitted  
 7 substantial evidence of the threats, harassment, and reprisals suffered by traditional marriage  
 8 supporters in the wake of the Proposition 8 election in November 2008. (*See generally*, Dkt. 4,  
 9 Exs. 14–15.) Plaintiffs have also submitted evidence that individuals associated with the R-71  
 10 campaign have also been targeted as a result of their support of traditional marriage. (Dkt. 1, 4,  
 11 and 32.)

12 Importantly, the Supreme Court found this same record sufficient to stay the broadcast of  
 13 the Proposition 8 trial in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2009). The Supreme Court  
 14 expressed concern about how cameras, and the fear of harassment, would impact testimony and  
 15 the witnesses' willingness to cooperate in future proceedings. *Id.*

16 These same concerns are present here. Protect Marriage Washington requests a protective  
 17 order during the discovery process to allow all parties to engage in their fact-finding free from  
 18 the harmful influence of threats, harassment, and reprisals.

19 Defendants rely on the argument that some witnesses deposed are not concerned with their  
 20 identities or involvement in this case becoming public. (Dkts. 129 at 8; 133 at 3; 134 at 4.) Such  
 21 an argument demonstrates a fundamental misunderstanding of Plaintiffs' as-applied challenge.  
 22 The reasonable-probability test was created by the Supreme Court because threats, harassment,  
 23 and reprisals chill protected First Amendment activity. *Buckley v. Valeo*, 424 U.S. 1, 68-74  
 24 (1976). That some might be willing to come forward in spite of this threat proves nothing.  
 25 Rather, the reasonable-probability test—and a protective order here—is about protecting those  
 26 who are too afraid to speak—or too afraid to come forward as a witness—in light of the  
 27 reasonable probability of threats, harassment, and reprisals. *See id.* at 73 (noting it will be  
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1 difficult to find “witnesses who are too fearful to contribute but not too fearful to testify about  
2 their fear”).

3 Defendants’ objection as to some witnesses’ willingness to make their participation known  
4 is nothing more than a restatement of the Supreme Court’s recognition that only the most brave  
5 will be willing to come forward and testify in light of such harassment. *Id.* And for individuals  
6 who are not already too afraid to come forward, *id.*, a single incident involving an individual  
7 identified as a participant in these proceedings will certainly do the trick.

8 Finally, WAFST argues that Plaintiffs have not made the necessary showing of good cause  
9 required to obtain a protective order. (Dkt. 129 at 7.) In support, WAFST filed the Declaration of  
10 Kevin Hamilton, their attorney, and attached partial copies of deposition transcripts. (Dkt. 130.)  
11 Omitted from Exhibit A are transcript pages 20–32, 47–73, and 79–100. A substantial portion of  
12 the transcript is omitted from Exhibit B. The omitted pages contain testimony regarding  
13 harassment suffered by the witnesses as a result of their support of R-71. (*See* Dkt. 134, Exs. B  
14 & C (true and correct copies of the same deposition transcripts filed by State Defendants).)  
15 Plaintiffs invite the Court to review the entire transcript, as it supplements the already substantial  
16 record of harassment in this case.

17 In light of the limited scope of Plaintiffs’ motion for protective order, Plaintiffs have more  
18 than satisfied the “good cause” necessary to warrant a protective order for the duration of the  
19 discovery process in this case.

## 20 Conclusion

21 Plaintiffs seek a reasonable protective order in light of the unique circumstances of this case.  
22 A blanket protective order to protect the identities of supporters of traditional marriage is  
23 necessary because of the accelerated discovery schedule ordered by this Court. Since Plaintiffs  
24 filed their motion, Defendants have already taken six depositions and are scheduled to take six  
25 additional depositions in the coming week alone. (Dkt. 138, Decl. of Scott F. Bieniek.) If  
26 required to file individual motions for protective order, the parties will need to reallocate  
27 precious resources to such motions as opposed to conducting discovery, delaying the ultimate  
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resolution of the present dispute, and wasting this Court's valuable resources arguing about the confidentiality of materials that may not ultimately be used at trial.

Therefore, Plaintiffs respectfully request a blanket protective order to protect the identities of traditional marriage supporters learned through the discovery process. This would include a witness' name, address, occupation, employer, telephone number, email address, and other personal and identifying information.

When the parties designate materials for inclusion in the judicial record, Plaintiffs respectfully request an opportunity to file an appropriate motion to seal any documents still in need of protection.

Dated this 17th day of September, 2010.

Respectfully submitted,

/s/ Scott F. Bieniek

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*\*Pro Hac Vice Application Granted*

**CERTIFICATE OF SERVICE**

I, Scott F. Bieniek, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On September 17, 2010, I electronically filed the foregoing document described as Reply in Support of Plaintiffs' Motion for Protective Order with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 17th day of September, 2010.

/s/ Scott F. Bieniek  
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